

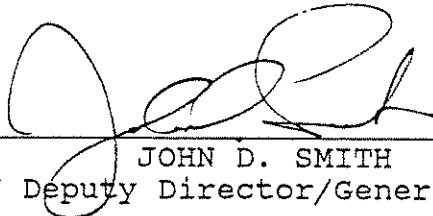
CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re:) 1988 OAL Determination No. 12
Request for Regulatory)
Determination filed by) [Docket No. 87-018]
Joe A. Jeter concerning)
the Office of the State)
Architect's Requirements)
for Construction of)
Essential Services)
Buildings pursuant to)
SB 239 and proposed)
regulations, as indicated)
in Addendum No. 1)
(Transaction No. 8601043))
to the Notice of the)
Invitation to Bid¹)

ENDORSED FILED
IN THE OFFICE OF
JUL 21 3 51 PM 1988
MARCH TONG EU
JULY 21, 1988
SECRETARY OF STATE
OF CALIFORNIA

Determination by:


JOHN D. SMITH
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SYNOPSIS

The issue presented to the Office of Administrative Law was whether certain design and construction requirements applied by the Office of the State Architect to planned "essential services buildings" ("ESBs") are "regulations" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that part of the requirements are "regulations" required to be adopted in compliance with the Administrative Procedure Act, and that part are not. The requirements are regulatory in two respects: (1) in that they condition the lease or purchase of the ESB by the State upon the completion and submission of certain forms to the Office of the State Architect by the ESB contractor, and (2) insofar as they mandate ESB contractors to conform to school and hospital construction standards set out in Title 24 of the California Code of Regulations. The ESB design and construction requirements are not regulatory, however, insofar as they reflect (a) Model Code provisions or (b) Title 24 provisions not expressly limited to specified structures, e.g., hospitals or schools, or (c) the Essential Services Buildings Seismic Safety Act.

THE ISSUE PRESENTED 2

The Office of Administrative Law ("OAL") has been requested to determine³ whether requirements established by the Office of the State Architect ("OSA") for the design and construction of essential services buildings are "regulations" as defined in Government Code section 11342, subdivision (b), and therefore violate Government Code section 11347.5, subdivision (a).⁴

THE DECISION 5, 6, 7, 8

OAL finds that:

- I. The OSA requirement that the lease or purchase of the ESB is conditioned upon the completion and submission of certain forms to OSA (1) is subject to the rulemaking requirements of the Administrative Procedure Act ("APA");⁹ (2) is a "regulation" as defined in the APA, and (3) is therefore in violation of Government Code section 11347.5, subdivision (a).
- II. The OSA requirement that ESB contractors conform to the school and hospital construction standards set out in Title 24 (1) is subject to the rulemaking requirements of the APA; (2) is a "regulation" as defined in the APA, and (3) is therefore in violation of Government Code section 11347.5, subdivision (a).
- III. The OSA requirements for the design and construction of ESBs are not "regulations" insofar as they reflect (a) Model Code provisions, (b) Title 24 provisions of the California Code of Regulations ("CCR") (formerly known as the California Administrative Code) not expressly limited to specified structures, e.g., hospitals or schools, or (c) the Essential Services Seismic Safety Act of 1986.

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The origins of the Office of State Architect may be traced to 1907, when the Department of Engineering contained an Architectural Department headed by the State Architect. In 1916 the State Architect became the director of the newly named Bureau of Architecture, which was still within the Department of Engineering. In 1921, the department and the bureau were renamed the Department of Public Works, Division of Architecture, with the State Architect designated the chief of the Division of Architecture.¹⁰

The State Architect position was codified in 1945 with the enactment of California Government Code section 14006, now Government Code section 14950. That section provides in part:

"There is in the Department of General Services a State Architect. He shall be appointed by the Governor with the approval of the Senate for a term of four years. . . ."

The Office of the State Architect has general charge of the erection of all state buildings,¹¹ and reviews and approves plans for the safety of design and supervises construction of public school buildings.¹²

Authority ¹³

The Office of the State Architect (OSA) has been granted specific rulemaking authority to adopt rules and regulations for the implementation of the Essential Services Building Seismic Safety Act of 1986 by section 16022 of the California Health and Safety Code, which provides in part:

"The State Architect shall do all of the following:

". . .

"(b) [e]stablish and adopt, in consultation with the League of Cities, County Supervisors Association, and California Building Officials, those regulations deemed necessary for carrying out this chapter. . . ." [Emphasis added.]

OSA has been granted specific rulemaking authority to adopt rules and regulations for the implementation of other statutes. Regulations adopted by OSA are found in Titles 21 and 24 of the California Code of Regulations. If regulations

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are deemed "building standards," these regulations are printed in Title 24, which includes the State Building Code.

Applicability of the APA to Agency's Quasi-Legislative Enactments

The APA applies to all state agencies, except those "in the judicial or legislative departments."¹⁴ Since the Office of the State Architect is in neither the judicial nor the legislative branch of state government, we conclude that APA rulemaking requirements generally apply to that agency.¹⁵

In addition, insofar as OSA has followed APA procedures in attempting to develop regulations implementing the Essential Services Building Seismic Safety Act (as discussed below), OSA has by its actions in effect conceded that regulations governing construction of essential services buildings are subject to the requirements of the APA.

General Background

To facilitate understanding of the issues presented in this proceeding, we discuss pertinent statutory and regulatory history as well as the undisputed facts and circumstances giving rise to the present Determination.

In 1985, the Legislature enacted the Essential Services Buildings Seismic Safety Act of 1986 ("Act"), which was codified in Health and Safety Code sections 16000 through 16023. This Act requires that buildings which provide essential services to the public be designed and constructed to resist forces generated by earthquakes, gravity, fire, and winds.¹⁶ An "essential services building" is defined to include those buildings used as a fire station, police station, emergency operations center, California Highway Patrol office, sheriff's office, or emergency communication dispatch center.¹⁷

This statute is similar to the Field Act¹⁸ and the Hospital Seismic Safety Act,¹⁹ which require that schools and hospitals, respectively, be designed and constructed to resist the forces generated by earthquakes, gravity and winds.

Pursuant to Health and Safety Code section 16022 (quoted above), the Office of the State Architect initiated a rulemaking proposal to adopt sections 201 through 249 of Title 21 of the CCR. This proposal was noticed for public comment on October 14, 1986.²⁰

Before the rulemaking proposal could become a duly adopted regulation with the force and effect of law, however, it was necessary for it to be reviewed for compliance with the

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requirements of the APA. In California, before proposed regulations can be filed with the Secretary of State, before they become legally effective and before they can be printed in the CCR, they must be approved by the Office of Administrative Law.

The rulemaking proposal initiated in October 1986 would have specified which portions of Title 24 apply to ESBs and outlined administrative procedures required for the review and approval of ESB design and construction by both OSA and local building officials. These proposed regulations were fashioned after the regulations governing the special design and construction criteria required for hospitals and schools.²¹

Pursuant to Government Code section 11349.1, in February 1987, OSA submitted the proposed regulations to OAL for review. Under the APA, OAL is obligated to review each proposal for compliance with not only the six "substantive standards" (Clarity, Necessity, Authority, Reference, Consistency, and Nonduplication), but also procedural requirements (e.g., "was the public notice complete?").

OAL's review of OSA's proposed regulations revealed a number of deficiencies, including lack of compliance with the necessity standard, clarity of display problems, and non-compliance with procedural requirements. OAL formally disapproved the regulations and issued a disapproval decision on March 11, 1987, detailing the deficiencies in the proposed regulations.

In May 1987, following extensive consultation with OAL staff, OSA submitted a revised version of the rulemaking proposal to OAL. This revised proposal also contained a number of serious Clarity, Consistency, and Necessity deficiencies, and failed to comply with procedural requirements. OAL formally disapproved the regulations and submitted a disapproval decision on June 11, 1987, detailing the reasons for the disapproval.

In October 1987, following further consultation with OAL staff, OSA again submitted a revised version of the rulemaking proposal to OAL. Once again, the proposed regulations were disapproved by OAL for lack of compliance with the Clarity, Consistency, and Necessity standards. The formal disapproval decision outlining these deficiencies was submitted to the agency on November 9, 1987. Again, OAL staff reviewed the disapproved file with OSA, outlining possible solutions to the remaining problems.

Under Government Code section 11349.4, subdivision (a), OSA had 120 days from the date of the disapproval decision to resubmit the disapproved regulations to OAL. Our records indicate that to date, a revised proposal has not been resubmitted to OAL. Indeed, in light of the fact that more

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than a year has now passed since the original notice was published, a new notice inviting public comment must be published in the Notice Register before the rulemaking process may be continued.²²

A Request for Determination was filed with OAL on October 6, 1987, concerning the requirements OSA established for the construction of California Highway Patrol (CHP) facilities under the Essential Services Buildings Seismic Safety Act. The requester, Joe Jeter, was the contractor who won the bid to construct CHP facilities in Redding and Redway to lease to the state. Just prior to the commencement of the bidding in March 1987, OSA advised bidders of the need to comply with the Act, which applies to contracts to construct essential services buildings entered into on or after July 1, 1986, and with the "appropriate" regulations "adopted by" the Office of the State Architect, Structural Safety Section (OSA/SSS).²³

The Requester contends that OSA required that the Requester comply, in constructing the CHP facilities, with the Title 21 regulations OSA proposed, but never formally adopted. In addition, the Requester contends OSA required compliance with Title 24 regulations (Title 24 includes the State Building Code), including those regulations establishing special requirements for the construction of schools and hospitals.

It is the Requester's contention that the Act requires compliance with the Model Codes, such as the Uniform Building Code, but not with Title 24. Some of the requirements with which the Requester contends he had to comply include the construction of a structural steel canopy over the gas pumps, a concrete block enclosure seventy-five feet from the main building to protect a metal trash can, and the attachment to the building of sheet metal rain gutter downspouts. In addition, the Requester contends he had to complete and submit certain forms to OSA before the state would commence the lease payments.²⁴

On June 17, 1988, OSA filed its Response to the Request, the contents of which Response are discussed below.

II. DISPOSITIVE ISSUES

There are two main issues before us:²⁵

- (1) WHETHER THE REQUIREMENTS ESTABLISHED BY OSA ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (2) WHETHER THE REQUIREMENTS ESTABLISHED BY OSA FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

- A. FIRST, WE INQUIRE WHETHER THE REQUIREMENTS ESTABLISHED BY OSA ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure" [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) No state agency shall issue, utilize, enforce or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b), involves a two-part inquiry:

First, is the informal rule adopted by the agency either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the informal rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

1. Are the Requirements Established by OSA Standards of General Application or a Modification or Supplement to Such Standards?

The answer is "yes."

Requester appears to contend (and OSA does not deny) that these requirements are standards of general application. Requester argues that OSA is prematurely enforcing regulations which have not yet been adopted pursuant to the APA. For example, OSA has required the Requester to complete certain forms which were contained in the proposed regulations. Therefore, we infer that these requirements are being applied to all ESB contractors.

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.²⁶ We infer from the record before us (especially the Response), that these requirements are being applied to all persons similarly situated (i.e., all ESB contractors), and thus are standards of general application.

2. Do the Requirements Established by OSA Interpret, Implement or Make Specific the Law Enforced or Administered by OSA or Govern OSA Procedure?

The answer to this question is in part "no," and in part "yes."

Health and Safety Code section 16009 provides in part that:

"The appropriate enforcement agency which meets the requirements of sections 16017 and 16018 [i.e., OSA] shall review the design and inspect the construction of essential services buildings . . . to the extent it deems necessary to ensure that drawings and specifications comply with the applicable sections of the Model Code, as defined in Section 18916 and specified in Title 24 of the California Administrative Code,"
[Emphasis added.]

Health and Safety Code section 16013 provides, in part, that:

"The enforcement agency [i.e., OSA] shall approve or reject all drawings and specifications for the construction . . . of all essential services buildings, and in doing so, shall review the design calculations, drawings, and specifications to ensure compliance with the requirements of this chapter. A record shall be kept by the enforcement agency indicating that design calculations, drawings, and specifications have been reviewed

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and conform with the applicable sections of the Model Code, as defined in Section 18916 and specified in Title 24 of the California Administrative Code." [Emphasis added.]

Health and Safety Code section 18916 defines "Model Code" as:

". . . any building code drafted by private organizations or otherwise, and shall include, but not be limited to, the latest edition of the following:

- (a)
- (b) The Uniform Building Code
- (c) The Uniform Plumbing Code
- (d) The Uniform Mechanical Code
- (e)
- (f)"

Title 24 of the CCR is the State Building Code, which is based upon and incorporates the various Model Codes specified in Health and Safety Code section 18916.

The Requester contends that Health and Safety Code section 16009 requires that the construction of ESBs must comply with the Model Codes specified in Health and Safety Code section 18916, but not with the balance of Title 24. The Requester also contends that in constructing these particular CHP facilities, OSA required the construction of a 100 year life span building, a structural steel canopy over the gas pumps, a concrete block enclosure protecting metal trash cans, the attachment of sheet metal rain gutter downspouts, and the completion and submission of OSA forms, none of which is required by the Act or the Model Codes.

OSA responded to this Request for Determination on June 17, 1988. One of OSA's contentions is that:

"Health and Safety Code section 16013 requires all drawings and specifications to conform with the applicable sections of the Model Code as defined in current law and specified in Title 24 of the California Administrative Code. The contract specifications required all structural, electrical, mechanical and plumbing systems and equipment installations to be in accordance with the appropriate regulations^[27] adopted by the Office of the State Architect, Structural Safety Section

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(OSA/SSS). In accordance with the contract specifications and current law, the OSA/SSS informed Mr. Jeter that the projects must comply with the Department's building standards contained in Title 24, California Code of Regulations. The OSA/SSS has adopted Title 24 regulations for a number of years. . . . These standards cannot be considered underground regulations." [Emphasis added.]

OSA further stated that ". . . both the contract specifications and current law require the California Highway Patrol projects to comply with Title 24, California Code of Regulations, as adopted by the OSA/SSS."

Construction Requirements

Neither the Requester nor OSA has specified the particular sections within either the proposed Title 21 regulations, Title 24 or the Model Codes which require construction of the specific items the Requester complains of, i.e., construction of a 100 year life span building, a structural steel canopy, a concrete block enclosure, and the attachment of sheet metal downspouts.

In determining whether OSA is interpreting, implementing, or making specific the Act, we must determine whether the previously emphasized language of Health and Safety Code sections 16009 and 16013 requires compliance with applicable sections of Title 24. If these statutes require compliance with Title 24, and OSA is merely applying these Title 24 regulations, and not otherwise implementing, interpreting or making specific the provisions of the statute, then OSA is not violating Government Code section 11347.5. If, however, the statute requires only compliance with the Model Codes and there is no other provision within any other statute or regulation which would require compliance with Title 24, then OSA would be impermissibly applying requirements that must first be adopted pursuant to the APA.

In a previous Determination, we stated:

"If a rule simply applies an existing constitutional, statutory or regulatory requirement that has only one legally tenable 'interpretation,' the rule is not quasi-legislative in nature--no new 'law' is created."²⁸

Thus, if the statute may only be read one way, i.e., to require compliance with applicable sections of Title 24, then OSA's requirements are not regulatory. However, if the statute is subject to two interpretations, then a regulation is needed to specify the interpretation which is being given to the statute.²⁹

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In assessing whether the statute is subject to two interpretations, we look to OSA's rulemaking proposal, OSA's Response, and the legislative intent in drafting the statutory language under discussion.

During its above noted 1986-87 rulemaking effort, OSA proposed regulations to specify which sections of Title 24 would be applicable to ESBs. Proposed section 202 of Title 21³⁰ specified that certain sections of Title 24 would apply to ESBs. That proposed regulation provided in part:

". . . .

"Chapters 2-23, 2-24, 2-25, 2-26, 2-27, 2-28, 2-29, 2-30, 2-32, 2-37, 2-47, 2-54, and 2-60 of Part 2, Title 24, CAC, as adopted by the Office of the State Architect/Structural Safety Section, designate the structural building regulations which shall apply to any essential services building as defined in Section 16007 of the Health and Safety Code. . . .

"These rules and regulations establish reasonable standards and minimum requirements for the structural integrity of essential services buildings. The design and construction of the electrical, mechanical, and plumbing systems in essential services buildings shall conform to the applicable building regulations as adopted by OSA/SSS in Part 3, Part 4, and Part 5, respectively of Title 24, CAC"

In its supplemental Final Statement of Reasons to the rulemaking proposal noticed on October 14, 1986, OSA stated that:

"This section is deemed necessary to make specific that essential services buildings . . . are required to comply with these regulations This section further establishes the building standards to which the essential services buildings design and construction must conform. The provisions in Title 24, CAC, are considered the appropriate building standards code for essential services buildings since the level of seismic safety mandated by the Act is comparable to that which is required for hospital building design and construction " [Emphasis added.]

Use of the phrase "to make specific" reveals that in drafting this regulation, OSA intended to clarify the standards with which ESBs must comply, by specifying that Title 24 is to apply to ESBs.

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Proposed section 205 of Title 21³¹ provided in part:

"Building standards are set forth in Parts 2, 3, 4, 5, and 7 of Title 24, CAC, and have been adopted as a basis for the approval of plans and specifications"

According to OSA, in its Final Statement of Reasons, the purpose of proposed section 205 of Title 21 was as follows:

"This section is deemed necessary to establish that the building standards contained in either the model codes or in Title 24, CAC, are minimum requirements" [Emphasis added.]

As with the prior proposed regulation, it appears that OSA intended to make clear in proposed section 205 that Title 24 standards apply to ESBs independent of the Model Codes.

During the public hearing conducted during the rulemaking process, a member of the public asked OSA to explain why OSA believed that the Act gave the agency authority to apply Title 24 regulations to ESBs in addition to the Model Codes. OSA responded that the Legislature, in passing the Act intended, that Title 24 regulations would apply to the design and construction of ESBs.

Peter Guisisola, Building Official for the City of Rocklin, inquired during the public hearing:

". . . Where is the reference where the legislature tells the State Architect to use the schools and hospitals standards [for ESBs], basically?" [Emphasis added.]

In response to this question, the transcript of the public hearing contains the following colloquy:

"H. Campbell (OSA) - Sections 16009 and 16013 which refers to Section 18916 in the Health and Safety Code, and as specified in Title 24 of the CAC."

"J. Meehan (OSA) - Section 16001 talks about the intent of the legislature that essential services buildings to be capable of providing essential services to the public after a disaster. That phrase tells the level of protection. Similar wording is used in the Hospital Act.

"P. Guisisola - Doesn't it seem that the wording is maybe saying what the UBC [Uniform Building Code] says that you are supposed to deal with essential services [i.e., that ESBs must simply conform to UBC (Model Code) requirements].

"Meehan (OSA) - The laws were that way before.

"P. Guisisola - I think this law was to emphasize the need to apply the UBC in all cases. Also to expand on the UBC by getting into control equipment, dispatch equipment, etc.

"H. Campbell (OSA) - If you look at the legislative council [sic] guidelines, I'll read it to you. It says SB239, L. Greene, Essential Services Building. 1. Existing law provides for State regulation for the design and construction of hospital buildings as defined to assure that hospitals are designed and constructed to resist insofar as practical the forces generated by earthquake, gravity and wind. This bill would enact the essential services building seismic safety Act of 1986 which would declare the intent of the legislature that essential services buildings be designed and constructed to resist insofar as practical the forces generated by earthquake, gravity, fire etc.

"In talking to the sponsors of the bill, the Seismic Safety Commission, that was their intent. That the same level of safety as was provided for hospitals should be applied to the essential services buildings. Our interpretation is that the higher level of safety is obtained through utilization of Title 24 with UBC as a reference document. There are some changes. Only the changes in UBC are printed in Title 24. . . .

"P. Guisisola - It is clear that UBC [as opposed to UBC and Title 24] was the intent.

"Campbell (OSA) - That is an area of disagreement. We will see what the Office of Administrative Law says about it.

"P. Guisisola - It is my opinion that OSA has gone beyond the legislative intent [in applying Title 24 provisions concerning hospitals and schools to ESBs].

"Campbell (OSA) - One question. If it were intended to use UBC only, my contention is, if that were the intent for local jurisdictions, the state laws that state buildings now be constructed in accordance with Title 24, the law could have said this - Design calculations, drawings and specifications have been reviewed and conform with the applicable sections of the model code as defined in Section 18916 for local jurisdiction and specified in Title

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24 those state agency jurisdiction. If that were the intent of the law, they could have written it that way. That is clear and concise. If they want to go back and change the law they can.

"P. Guisisola - I think that the intent wouldn't have been born [sic] out as these regulations are written.

"Campbell (OSA) - We can only read what the law says, not whatever verbal agreements were made. We did consult with CALBO. We feel that to utilize [solely the] UBC without specific direction from the legislature and with the intent as expressed through the legislative's council [sic] digest, the intent was to use Title 24 [also].

"P. Guisisola - It seems that the intent was the legislature clearly stating to local jurisdiction that you will enforce the UBC regulations. You will also expand on that and apply seismic considerations to equipment. Not that we would be involved in administering the State Architect's regulations as they apply to schools and hospitals. . . ." [Emphasis added.]

OSA also addressed the questions of Mr. Guisisola in a letter dated January 28, 1987, stating:

"Section[s] 16009 and 16013, Health and Safety Code, requires the construction documents to comply with the applicable sections of the Model Code as defined in Section 18916 and specified in Title 24, CAC, to insure the protection of life and property. This act also requires the same level of performance as that required of hospitals as indicated above. The regulations adopted in Title 24, CAC, for hospitals are based upon the UBC with revisions as needed to accomplish or raise the level of safety intended by the legislature. Therefore the UBC cannot be used alone. It must use the supplements given in Title 24, CAC, for the increased level of performance. If the Legislature intended that only UBC be used as a basis for designs it appears that they would have specified the use of only the UBC." [Emphasis added.]

It appears from the above comments and responses that the statutes (Health and Safety Code sections 16009 and 16013) have been interpreted by a commenter to mean that only the Model Codes are to apply, yet OSA is interpreting the statutes to mean that Title 24 regulations in addition to the Model Codes apply.

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OSA had attempted to codify its interpretation of the Act in the proposed Title 21 regulations, especially sections 202 and 205 which are set forth above. Since the proposed regulations are interpreting the Act, they are in fact "regulations" as defined in Government Code section 11342, subdivision (b). It is obvious that OSA also believed that the proposed regulations are "regulatory" in that the agency attempted to adopt these regulations three times pursuant to the requirements of the APA.

If OSA is applying Title 24 regulations to ESBs based on the proposed Title 21 regulations, OSA is violating Government Code section 11347.5, as it is enforcing requirements or standards which are "regulations" that have not been adopted pursuant to the APA.

In its Response, OSA contends that it did not ". . . issue, utilize, enforce or attempt to enforce its proposed Title 21 regulations. . . ." and that it ". . . enforced the clear statutory provisions of the Essential Services Buildings Seismic Safety Act of 1986." If there is statutory authority to apply Title 24 regulations to ESBs, independent of the proposed regulations, then OSA would not be in violation of Government Code section 11347.5.

A reading of the statute indicates that the Model Codes, which are defined in a statute and specified in Title 24--and not all of Title 24--are to apply to essential services buildings. It appears from the responses by OSA and from its proposed regulations that OSA is interpreting this statute to require compliance with not only such Model Code provisions as are specified in Title 24, but also with additional Title 24 requirements.

To support its position that Title 24 applies to ESBs, OSA attached two letters to its Response--a letter dated April 7, 1988 from Richard Conrad, Executive Director of the State Building Standards Commission to L. Thomas Tobin of the Seismic Safety Commission and a letter from Mr. Tobin dated April 28, 1988, in response to Mr. Conrad's letter. In the April 7, 1988 letter, Mr. Conrad advised Mr. Tobin that "There has been a continuing controversy over the correct interpretation of section 16013 of the Essential Services Buildings Seismic Safety Act of 1986." [Emphasis added.] Mr. Conrad requested a written statement from Mr. Tobin, as the sponsor of SB 239 (the Act), specifying which code Mr. Tobin intended for use in the design and construction of essential services buildings.

Mr. Tobin responded by quoting from the January 10, 1985 minutes of the regular meeting of the Seismic Safety Commission regarding the Act:

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"There was an extensive discussion regarding whether to include the regulations in Title 24 or implement them through the Uniform Building Code. Local officials are familiar with the Uniform Building Code and it would be easier for them to have it incorporated into that Code. Commissioner Condon commented that San Francisco had been going through enforcement provisions and the City Attorney is mandating that Title 24 be minimum state building code -- you cannot design or build a building that is less restrictive than the requirements of title 24. The State Architect, Whitson W. Cox, did not see any conflict between the two alternatives." [Emphasis added.]

Mr. Tobin continued:

"Restated then, the Commission intended that Title 24 should apply for both local and state enforcement agencies. The Commission believed that Title 24 had incorporated the relevant portions of the Model Code and met the legislative intent of operationally maintaining buildings that provide essential services after an earthquake."

The statutes do not clearly state that Title 24 regulations, in addition to the Model Codes, apply to ESBs. OSA contends that it was the Legislature's intent in enacting the Act that ESBs be required to comply with Title 24 as well as the Model Codes.

It is well recognized that when the language of a statute is clear and unambiguous, there is no need for statutory construction. In construing an ambiguous statute, a court must ascertain the intent of the Legislature so as to effectuate the purpose of the law. All other rules of statutory construction must yield to this controlling principle. The California Supreme Court has stated:

"Once a particular legislative intent has been ascertained, it must be given effect 'even though it may not be consistent with the strict letter of the statute.'" [Citation] . . . "The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act."³² [Emphasis added.]

"The cardinal principal of statutory construction is that, absent a single meaning of the statute apparent on its face, we must give it an interpretation based upon the legislative intent with which it was passed, and where the Legislature has expressly declared its intent, we must accept

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the declaration. [Citation.]"³³ [Emphasis added.]

OSA's interpretation of the statutes is in accord with a legislative committee summary report. The Assembly Governmental Organization Committee held a hearing regarding SB 239 on August 20, 1985, and stated in its Committee summary that:^{34, 35}

"Specifically, this bill [provides that]:

.

- 2) . . . ESBs [essential services buildings] must meet standards contained in model building codes as well as requirements imposed by Title 24 of the California Administrative Code." [Former emphasis in original, latter emphasis added.]

Therefore, it appears from this Committee summary that in adopting SB 239, the intent of the legislature was for Title 24 to apply as well as the Model Codes.

In line with this intent, OSA adopted technical building standards for ESBs in Title 24. In a letter from OSA regarding SB 239,³⁶ a copy of which is contained in the bill file of the author of SB 239 (Senator Leroy Greene), State Architect Whitson W. Cox stated:

"It is our belief that the technical building regulations applicable to essential services buildings will probably be similar to those adopted in Title 24, updated to the 1985 Uniform Building Code for public school and hospital buildings. In addition, the administrative regulations applicable to essential services buildings will probably be similar to those adopted in Title 21 for public school buildings."

The technical building regulations for ESBs are contained in Title 24. Section 2-102 in Part 2 of Title 24 provides that the purpose of the regulations is "to provide minimum standards . . . to all buildings and structures within the scope of this Code." Section 2-103(a) states these building standards apply to ". . . any building or structure within the authority of any State agency. . . ."

Section 2-110 describes the authority of the state agencies:

"(a) Vesting Authority. When adopted by a State agency, the provisions of these regulations shall be enforced by the appropriate enforcing agency but

only to the extent of authority granted to such agency by the State Legislature.

"(b) Responsibility of Agencies. [T]he specific scope of application of the Code provisions or building standards adopted by each agency; . . . and the specific statutory authority of each agency to adopt and enforce such provisions or building standards of this Code, . . . are as follows:

". . . .

"12. OSA/SSS--Structural Safety Section, Office of the State Architect.

Application--Public elementary and secondary schools, community college buildings, and Essential Services Buildings.

Enforcing Agency--Structural Safety Section, Office of the State Architect.

Authority Cited--Education Code Sections 39152 and 81142, and Health and Safety Code Section 16022.

Reference--Education Code Sections 39140 through 39157 and 81130 through 81147, and Health and Safety Code Sections 16000 through 16023. . . . " [Emphasis added.]

Health and Safety Code sections 16009 and 16013 do not, on their face, appear to include Title 24 regulations as part of the minimum standards for the design and construction of ESBs. Viewing these statutes in light of (1) the comments by a sponsor of the legislation (the Seismic Safety Commission), (2) the summary prepared by the Assembly Governmental Organization Committee, and (3) Title 24 sections 2-103(a) and 2-110(b)(12), we conclude that Title 24 in general, and not just the Model Codes, should apply to ESBs.

The entirety of Title 24, however, does not apply to ESBs. Only those sections not expressly limited to specified structures, e.g., hospitals or schools, are applicable to ESBs. For example, Part 2, Chapter 2-23 contains regulations which are limited in application by their own terms to hospitals and public schools, such as:

"Scope

Sec. 2-2301. The general design requirements applicable to all hospitals and public schools shall comply with the requirements and standards adopted by reference from Chapters 23 and 60, UBC, and with the modified references from UBC and other requirements set forth in this chapter." [Emphasis added.]

July 20, 1988

and

"Earthquake Regulations

Sec. 2-2312.

(a) General. Every hospital or public school building or structure and every portion thereof, including the nonstructural components, shall be designed and constructed" [Emphasis added.]

OSA could amend the State Building Code (Title 24) to make clear that certain seismic safety standards apply not only to hospitals and schools, but also to ESBs.

Though none of the pertinent provisions of law is a model of clarity, and though it is a close question, we conclude that OSA has not violated Government Code section 11347.5 in stating that Title 24 applies to ESBs. However, "underground regulations" problems are present insofar as OSA requires ESB contractors to comply with non-Model Code provisions of Title 24, the application of which has been expressly limited to hospitals and schools.

Required Forms

The Requester also contends that, before the State would commence its lease payments, the Requester was required to complete and submit certain forms, specifically form SSS-6A/E and form SSS-6.

Proposed regulation section 240 of Title 21³⁷ provides in part:

" . . . contractors shall file verified reports on Form SSS-6. Architects and engineers shall file verified reports on Form SSS-6A/E. (See Appendix for facsimile copies of Forms SSS-6 and SSS-6A/E.)" [Emphasis added.]

In the Supplemental Final Statement of Reasons, OSA stated the purpose of this section is to:

" . . . make specific who shall file a verified report to OSA/SSS, on what form, the number of copies and when the filing of a verified report is required." [Emphasis added.]

This proposed regulation lists three Health and Safety Code sections as both the Authority and Reference citations³⁸ (sections 16020, 16021, and 16022). However, none of these sections, nor any other code section within the Act, require that these or any other forms be completed by the contractor.

The proposed forms SSS-6 and SSS-6A/E (which are located in the Appendix to the proposed regulations) contain the following "Note":

". . .

"TWO COPIES REQUIRED AT COMPLETION OF PROJECT OR WHEN SERVICES IN CONNECTION WITH THE PROJECT ARE TERMINATED FOR ANY REASON.

SEE TITLE 21."

These same forms are also contained in the Title 21 regulations OSA earlier adopted to implement the Field Act (which as discussed above, requires that public schools be constructed to resist the forces generated by earthquakes, gravity and winds). Section 36 of Title 21 provides that OSA will supply Forms SSS-6 and SSS-6A/E, which must be filed at various times, including upon completion of the school building. Forms SSS-6 and SSS-6A/E (as set out in Title 21) are reproduced in Appendix A. These forms are located in subdivision (d) of the "APPENDIX-APPLICABLE FORMS" which follows section 55.

It is apparent from OSA's proposed regulations and from OSA's comment in its Supplemental Final Statement of Reasons that OSA, in requiring contractors of ESBs to complete these forms upon completion of the project and before the State will accept the project, is "interpreting, implementing, and making specific" provisions of the Act.

WE THEREFORE CONCLUDE THAT (1) OSA'S REQUIREMENTS ARE REGULATORY INsofar AS THEY (A) CONDITION THE LEASE OR PURCHASE OF THE ESB BY THE STATE UPON THE COMPLETION AND SUBMISSION OF CERTAIN FORMS TO OSA OR (B) MANDATE THAT ESB CONTRACTORS CONFORM TO SCHOOL AND HOSPITAL CONSTRUCTION STANDARDS SET FORTH IN TITLE 24 OF THE CCR, AND (2) OSA'S REQUIREMENTS FOR CONSTRUCTION OF ESBs ARE IN PART NON-REGULATORY INsofar AS THEY REFLECT (A) MODEL CODE PROVISIONS, (B) TITLE 24 PROVISIONS NOT EXPRESSLY LIMITED TO SPECIFIED STRUCTURES, E.G., HOSPITALS OR SCHOOLS, OR (C) PROVISIONS OF THE ACT.

July 20, 1988

B. SECOND, WE INQUIRE WHETHER THE REQUIREMENTS ESTABLISHED BY OSA FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for instance, certain uses of forms³⁹--are not subject to procedural requirements of the APA.⁴⁰ We need not reach any conclusion regarding the applicability of recognized general exceptions to APA requirements with respect to the portion of OSA's requirements which are contained in the expressly applicable sections of Title 24 and the Model Codes, as those requirements are not regulatory.

However, none of the recognized exceptions (set out in note 40) apply to those OSA requirements which have been found to be regulatory--i.e., requiring the completion of certain forms prior to the State's acceptance of the project. Additionally, OSA did not assert in its Response to this Request for Determination that any exceptions apply to its requirements.

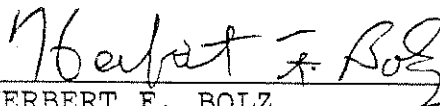
July 20, 1988

III. CONCLUSION

For the reasons set forth above, OAL finds that:

- I. The OSA requirement that the lease or purchase of the ESB is conditioned upon the completion and submission of certain forms to OSA and the requirement that ESB contractors conform to the school and hospital construction standards set out in Title 24 are (1) subject to the rulemaking requirements of the APA; (2) "regulations" as defined in the APA; and (3) therefore in violation of Government Code section 11347.5, subdivision (a).
- II. The OSA requirements for the design and construction of ESBs are not "regulations" insofar as they reflect (a) Model Code provisions, (b) Title 24 provisions not expressly limited to specified structures, e.g., hospitals or schools, or (c) provisions of the Essential Services Seismic Safety Act of 1986.

DATE: July 21, 1988


HERBERT F. BOLZ
Coordinating Attorney


LILLIAN R. WATERS
Staff Counsel

Rulemaking and Regulatory
Determinations Unit⁴¹

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Sacramento, California 95814
(916) 323-6225, ATSS 8-473-6225
Telecopier No. (916) 323-6826

- 1 This Request for Determination was filed by Joe A. Jeter, 2021 23rd Street, Sacramento, CA 95818. The Office of the State Architect was represented by the State Architect, Michael J. Bocchicchio, Sr., AIA, 1500 Fifth Street, Sacramento, CA 95814 (916) 445-4167.
- 2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. Since April 1986, the following published cases have come to our attention:

Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of regulation articulating standard by which to measure licensee's competence); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed--a rule appearing solely on a form not made part of the CCR); National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (invalidating internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR); Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n.5, 211 Cal.Rptr. 758, 764, n.5 (court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems); Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857 (court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute); Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 199 Cal.App.3d 228, 244 Cal.Rptr. 693 (court found--without reference to any of the pertinent case law precedents--that the Structural Pest Control Board's auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism.")

Readers aware of additional "underground regulations" decisions--published or unpublished--are invited to furnish OAL with a citation to the opinion and, if unpublished, a copy. Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index (see note 40, infra).

- 3 Title 1, California Code of Regulations (CCR), (formerly known as California Administrative Code), section 121, subdivision (a), provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the Act." [Emphasis added.]

- 4 Government Code section 11347.5 (as amended by Stats. 1987, ch. 1375, sec. 17) provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule is a regulation as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.
2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.
2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added to highlight key language.]

- 5 As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5: "The office shall . . . [m]ake its determination available to . . . the courts." (Emphasis added.)

6 Note concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments. The comment submitted by the affected agency is referred to as the "response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point in its response and to permit OAL to devote its resources to analysis of truly contested issues.

In the matter at hand, a comment (an additional letter) from the Requester was received by OAL on June 6, 1988, and OSA submitted a Response to the Request for Determination on June 17, 1988. Both were considered in making this Determination.

- 7 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subdivision (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)
- 8 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on p. 1.
- 9 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.
- 10 State of California, Department of General Services, Office of Architecture and Construction, History of Office of Architecture and Construction (1968) pp. 3-4, 9.
- 11 Government Code section 14951.
- 12 State of California, Department of General Services, Office of Architecture and Construction, History of Office of Archi-

ecture and Construction (1968) pp. 23-25.

- 13 We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that point in time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. Such comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code sec. 11349.1.)

- 14 Government Code section 11342, subdivision (a). See Government Code sections 11343 and 11346. See also 27 Ops.Cal. Atty.Gen. 56, 59 (1956).
- 15 See Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
- 16 Health and Safety Code section 16001.

- 17 Health and Safety Code section 16007.
- 18 Education Code sections 39140-39157, 81130-81147.
- 19 Health and Safety Code sections 15000-15095.
- 20 The original rulemaking proposal sought to number the proposed regulations sections 1 through 40, but as Title 21 already contained regulations numbered 1 through 55, the proposed regulations were renumbered 201 through 240 when the regulations were resubmitted to OAL in May 1987.
- 21 See Title 21, sections 1-55 for regulations pertaining to the construction of public schools.
- 22 Government Code section 11346.4.
- 23 Addendum No. 1 (Transaction No. 8601043) to the Notice of the Invitation to Bid, paragraph B.
- 24 The Requester also contends that "[t]he enforcement of these PROPOSED regulations have already resulted in substantial delays in my projects as well as unforeseeable construction cost overruns (emphasis in original)." The Requester further states in his comment that the Department of General Services' denial of his request for reimbursement of these cost overruns, based upon OSA's recommendation, is without merit. This Determination does not take a position on the validity of the Requester's claim for reimbursement.
- 25 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; type-written version, notes pp. 1-4.
- 26 Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

- 27 It is not clear from OSA's use of the phrase "appropriate regulations" whether OSA is referring to the proposed Title 21 regulations or to Title 24 regulations.
- 28 1986 OAL Determination No. 4 (State Board of Equalization, June 25, 1986, Docket No. 85-005) California Administrative Notice Register 86, No. 28-Z, July 11, 1986, p. B-7, B-15, typewritten version, p. 12.
- 29 By contrast see 1988 OAL Determination No. 10 (Department of Corrections, June 22, 1988, Docket No. 87-016), California Regulatory Notice Register 88, No. 28-Z, July 8, 1988, p. 2313 (only one reasonable interpretation of statute).
- 30 Amended and renumbered in the May 1987 resubmittal, formerly numbered section 2.
- 31 Amended and renumbered in the May 1987 resubmittal, formerly numbered section 5.
- 32 Friends of Mammoth v. Board of Supervisors of Mono County (1972) 8 Cal.3d 247, 259, 104 Cal. Rptr. 761, 769.
- 33 Tyrone v. Kelley (1973) 9 Cal.3d 1, 10-11, 106 Cal.Rptr. 761, 767.
- 34 The Committee's summary is contained in an undated document prepared for the Committee hearing scheduled for August 20, 1985.
- 35 "When determining the legislative purpose behind a statutory amendment, courts may properly rely not only upon its legislative history but also upon committee reports. [Citation.]" (Smith v. Rhea (1977) 72 Cal.App.3d 361, 369, 140 Cal.Rptr. 116, 120.)
- ". . . .
- "Statements in a report of a legislative committee concerning the object and purposes of a proposed amendment which parallel a reasonable interpretation of the amendment should be followed. [Citations.]" (Beltone Electronics Corp. v. Superior Court (1978) 87 Cal.App.3d 452, 455, 151 Cal.Rptr. 109, 110, footnote 1.)

- 36 The letter from Mr. Cox, entitled "Implementation of Senate Bill 239" is not dated. However, the letter in Senator Greene's file appears to have been received by Mr. Greene's office on December 30, 1985.
- 37 Amended and renumbered in the May 1987 resubmittal, formerly numbered section 40.
- 38 See Government Code section 11346.5, subdivision (a)(2) and Title 1, CCR, section 14.
- 39 See the 1987 OAL Determination No. 16 (Board of Behavioral Science Examiners, December 4, 1987, Docket No. 87-005) California Regulatory Notice Register 88, No. 1-Z, January 1, 1988, pp. 73-79, n. 20, wherein the background to the use of forms by state government is discussed, including the legislative history of the APA forms provision, pertinent case law and legislative intent.
- 40 The following provisions of law may also permit rulemaking agencies to avoid the APA's requirements under some circumstances, but do not apply to the case at hand:
- a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
 - c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
 - f. Contractual provisions previously agreed to by the complaining party. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376,

88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.) The Determination Index, as well as an order form for purchasing copies of individual determinations, is available from OAL, 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8 473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$50.

- 41 We wish to acknowledge the substantial contribution of Unit Legal Assistant Annemarie Starr in the preparation of this Determination.

(d) Verified Report.

1. Form SSS-6 to be filed by Contractor, Inspector, Company or School District Official.

STATE OF CALIFORNIA

DEPARTMENT OF GENERAL SERVICES
OFFICE OF THE STATE ARCHITECT

FOR OFFICE USE ONLY

VERIFIED REPORT NO. _____

SSS-6 (REV. 1/78)

NOTE:

ONE COPY REQUIRED ON THE FIRST OF
FEBRUARY, MAY, AUGUST AND NOVEMBER
ANDTWO COPIES REQUIRED AT COMPLETION
OF PROJECT, OR WHEN SERVICES IN
CONNECTION WITH THE PROJECT ARE
TERMINATED FOR ANY REASON.
(SEE TITLE 21, SECTION 38)

THIS REPORT INCLUDES ALL CONSTRUCTION WORK TO _____ DAY OF _____, 19 _____

SCHOOL DISTRICT	SCHOOL	FILE
SCHOOL BUILDING	CONTRACT PRICE \$	APPLICATION
PERCENTAGE OF PROJECT COMPLETED TO DATE	% COMPLETE	% COMPLETE
PRELIMINARY	FINISH	
SITE		
STRUCTURAL	EQUIPMENT	
FOUNDATION		
WALLS	MECHANICAL	
ROOF		
ENCLOSURE	ELECTRICAL	
	MISCELLANEOUS	
ESTIMATED TOTAL PROJECT COMPLETION		

GENERAL STATEMENT AS TO STATUS OF THE WORK

(1) I DECLARE UNDER PENALTY OF PERJURY THAT I HAVE READ THE ABOVE REPORT AND KNOW THE CONTENTS THEREOF THAT ALL OF THE ABOVE STATEMENTS ARE TRUE AND THAT I KNOW OF MY OWN PERSONAL KNOWLEDGE THAT THE WORK DURING THE PERIOD COVERED BY THE REPORT HAS BEEN PERFORMED AND MATERIALS USED AND INSTALLED, IN EVERY MATERIAL RESPECT, IN COMPLIANCE WITH THE DULY APPROVED PLANS AND SPECIFICATIONS THEREFOR.

(2) AND FURTHERMORE THAT I AM AN AUTHORIZED OFFICIAL OF _____ (FIRM OR CORPORATION)
WORKING IN THE CAPACITY OF _____ (OWNER, ARCHITECT, PRESIDENT, VICE-PRESIDENT, SUPERINTENDENT)
OF THE WORK OF CONSTRUCTION AND THAT I HAVE BEEN PROPERLY AUTHORIZED BY SAID FIRM OR CORPORATION TO SIGN THIS REPORT.

FIG. 2 TO BE FILLED IN ONLY WHEN SIGNED BY A CONTRACTING COMPANY OR SCHOOL DISTRICT OFFICIAL IN CHARGE OF FORCE-ACCOUNT CONSTRUCTION PURSUANT TO SECTION 32(C), TITLE 21.

NOTE: Only MANUAL signatures are acceptable.

SIGNATURE	DATE
TITLE (CONTRACTOR, INSPECTOR, COMPANY OR SCHOOL DISTRICT OFFICIAL)	
ADDRESS	

-GIVEN

(Reverse of Form SSS-6)

Sections 39151 and 81141 of the Education Code read in part:

The term "personal knowledge" as applied to the inspector means the actual personal knowledge which is obtained from his personal continuous inspection of the work of construction in all stages of its progress at the site where he is responsible for inspection and, when work is carried out away from the site, that personal knowledge which is obtained from the reporting of others on the testing or inspection of materials and workmanship for compliance with plans, specifications or applicable standards. The exercise of reasonable diligence to obtain the facts is required.

The term "personal knowledge" as applied to the contractor means the personal knowledge which is obtained from the construction of the building. The exercise of reasonable diligence to obtain the facts is required.

2. Form SSS-6A/E to be filed by Architect, Structural Engineer, Mechanical Engineer, and Electrical Engineer.

STATE OF CALIFORNIA

DEPARTMENT OF GENERAL SERVICES
OFFICE OF THE STATE ARCHITECT

FOR OFFICE USE ONLY

VERIFIED REPORT NO. _____

SSS-6A/E (REV. 8-78)

NOTE:

ONE COPY REQUIRED ON THE FIRST OF
FEBRUARY, MAY, AUGUST AND NOVEMBER
ANDTWO COPIES REQUIRED AT COMPLETION
OF PROJECT, OR WHEN SERVICES IN
CONNECTION WITH THE PROJECT ARE
TERMINATED FOR ANY REASON.
(SEE TITLE 21, SECTION 36)

THIS REPORT INCLUDES ALL CONSTRUCTION WORK TO _____ DAY OF _____, 19____

SCHOOL DISTRICT	SCHOOL	FILE
SCHOOL BUILDING	CONTRACT PRICE \$	APPLICATION
	1. COMPLETE	1. COMPLETE
PRELIMINARY	FINISH	
SITE		
STRUCTURAL	EQUIPMENT	
FOUNDATION		
WALLS		
ROOF	MECHANICAL	
ENCLOSURE	ELECTRICAL	
	MISCELLANEOUS	
	ESTIMATED TOTAL PROJECT COMPLETION	

GENERAL STATEMENT AS TO STATUS OF THE WORK

I DECLARE UNDER PENALTY OF PERJURY THAT I HAVE READ THE ABOVE REPORT AND KNOW THE CONTENTS THEREOF, THAT ALL OF THE ABOVE STATEMENTS ARE TRUE AND THAT I KNOW OF MY OWN PERSONAL KNOWLEDGE THAT THE WORK DURING THE PERIOD COVERED BY THE REPORT HAS BEEN PERFORMED AND MATERIALS USED AND INSTALLED, IN EVERY MATERIAL RESPECT, IN COMPLIANCE WITH THE DULY APPROVED PLANS AND SPECIFICATIONS THEREFOR.

INSTRUCTIONS FOR SUBMISSION OF SSS-6A/E

THE INDIVIDUAL SHOWN AS HAVING GENERAL RESPONSIBLE CHARGE OF OBSERVATION OF THE WORK OF CONSTRUCTION ON THE APPLICATION FOR APPROVAL OF PLANS AND SPECIFICATIONS, ITEM 6 OF FORM SSS-1, IS RESPONSIBLE FOR THE SUBMISSION OF THIS REPORT TO THE OFFICE OF THE STATE ARCHITECT. IF RESPONSIBILITY FOR OBSERVATION OF ANY PORTIONS OF THE WORK OF CONSTRUCTION WAS DELEGATED FORM SSS-1 - ITEMS 7A, 7B, 7C, AND 7D TO OTHERS, THIS REPORT MUST BE SIGNED BY THOSE SO DELEGATED THAT RESPONSIBILITY PRIOR TO SUBMISSION TO THE OFFICE OF THE STATE ARCHITECT

NOTE: Only MANUAL signatures of the architect and engineers are acceptable.

SIGNATURE OF ARCHITECT	DATE
ADDRESS	
SIGNATURE OF STRUCTURAL ENGINEER	DATE
ADDRESS	
SIGNATURE OF MECHANICAL ENGINEER	DATE
ADDRESS	
SIGNATURE OF ELECTRICAL ENGINEER	DATE
ADDRESS	

TITLE 21

OFFICE OF STATE ARCHITECT

(Register 83, No. 45—11-5-83)

§ 55

(p. 37)

(Reverse of Form SSS-6A/E)

Sections 39151 and 81141 of the Education Code read in part:

The term "personal knowledge" as used in this section and as applied to the architect, and the registered engineer, means the personal knowledge which is obtained from periodic visits to the project site of reasonable frequency for the purpose of general observation of the work, and also which is obtained from the reporting of others as to the progress of the work, testing of materials, inspection and superintendence of the work that is performed between the above-mentioned periodic visits of the architect or the registered engineer. The exercise of reasonable diligence to obtain the facts is required.

HISTORY:

1. Amendment of Form SSS-6A/E filed 9-30-77; designated effective 11-1-77 (Register 77, No. 40). For prior history, see Register 76, No. 42.

2. Amendment of Appendix (d)1. and 2. filed 9-8-83; effective 9-15-83 pursuant to Government Code Section 11346.2(d) (Register 83, No. 40).